No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL NELSON CURRIER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF INDIANA, ALABAMA, ARKANSAS, COLORADO, KANSAS, LOUISIANA, MAINE, MICHIGAN, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici *States*

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER*
Solicitor General
AARON T. CRAFT
LARA LANGENECKERT
JULIA C. PAYNE
Deputy Attorneys General

**Counsel of Record*

Additional counsel with signature block

QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Colorado, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of the respondent.

Currier claims that the issue-preclusion component of the Double Jeopardy Clause, *see Ashe v. Swenson*, 397 U.S. 436, 443–47 (1970), barred his trial on the felon-in-possession charge. In his view, the jury that acquitted him on the burglary and grand larceny charges necessarily found that he had not possessed the firearms, so a second jury could not find otherwise. Even assuming that factual premise, Currier created this scenario by consenting to severance of the felon-in-possession charge. Had the charges been tried together, no double jeopardy problem would have arisen had the jury acquitted on the burglary and grand larceny charges yet convicted on the firearm charge. *See United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932). It was only with Currier's consent—and for his benefit—that the court severed the charges, and defendants cannot cry double jeopardy when their own decisions created the issue. *See, e.g., Jeffers v. United States*, 432 U.S. 137, 152 (1977) (plurality opinion); *Lee v. United States*, 432 U.S. 23, 33–34

(1977); *United States v. Dinitz*, 424 U.S. 600, 607–12 (1976); *United States v. Jorn*, 400 U.S. 470, 484–85 (1971) (plurality opinion).

The *amici* States have an interest in maintaining state procedural and evidentiary rules that prevent any unfair prejudice from introduction of a defendant's prior convictions but still ensure prosecutors have a fair opportunity to press all charges arising from a single incident or transaction.

SUMMARY OF THE ARGUMENT

I. Numerous crimes require proof of the accused's criminal status, and joinder rules often force prosecutors to charge those crimes in conjunction with others that do not require such proof. Yet, as the rules of evidence reflect, it can be unfairly prejudicial for a jury to hear about a defendant's criminal history. Accordingly, criminal courts in many States will, through one procedural means or another, conduct separate trials so that proof of a defendant's criminal past does not taint the evidence with respect to a charge where it is not relevant.

Courts in some States, like Virginia, require such severance when the defendant requests it, in which case the charges are tried before different fact finders. Courts in other States require bifurcation, where the same jury hears all charges, but decides the charges unrelated to past criminal status before hearing evidence of that status.

A decision in Currier's favor would undermine these common efforts to safeguard defendants from unfair prejudice. Consider: if prosecutors must try all crimes arising out of a single incident at once to avoid the risk of being precluded from trying the status crimes at all, practices like severance and bifurcation will simply disappear.

II. The Court should reject the view, supported by the National Association of Criminal Defense Lawyers, that Currier is being forced into a "Hobson's choice" between his constitutional protection against double jeopardy and his constitutional right to a fair trial. The premise of that argument is that the Due Process Clause forbids trying an offense requiring proof of a prior conviction with other offenses, or that it prohibits the admission of evidence of the defendant's prior crimes. That premise is incorrect under the Court's precedents.

In *Spencer v. Texas*, 385 U.S. 554 (1967), the Court rejected a constitutional challenge to a Texas procedure where guilt on the underlying crime and a recidivist sentencing enhancement were considered by the same jury in a unitary proceeding. The Court held that placing the defendant's prior convictions before the jury did not violate the Fourteenth Amendment because they were relevant to the sentencing enhancement and were accompanied by an instruction limiting how the jury could use the information. It was irrelevant from a constitutional

perspective that other methods may have been deemed "fairer or wiser," as the Court does not sit as a rule-making committee for state criminal-justice systems. *Id.* at 564. The Court expressly reaffirmed *Spencer* in *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983), where it concluded that limiting instructions are effective and that no categorical common-law rule excluded evidence of prior crimes.

Nor is NACDL's argument supported by authority or practice in lower courts. While eighteen states require or prefer severance or bifurcation, most of the remaining states and the majority of federal courts do not require such measures. Instead, these courts rely on the trial judge's discretion along with curative measures, such as sanitization, stipulation, and limiting instructions. This common evidentiary practice carried on by the majority of state and federal courts does not violate the Due Process Clause.

ARGUMENT

I. A Ruling for Currier Would Discourage States from Safeguarding Defendants from Prejudicial Proof of Criminal Status

Currier's issue-preclusion claim arose because Virginia courts require that a charge of felon in possession of a firearm be severed from other charges, unless the accused and the Commonwealth agree to a joint trial. *See Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc). That

requirement is an exception to Virginia's general rule permitting joinder of offenses "based on the same act or transaction." Va. Sup. Ct. R. 3A:6(b). It is intended to minimize the impact of the defendant's status as a felon—an essential element of the firearm charge—on the factfinder's consideration of other charges for which that status is irrelevant. *See Hackney*, 504 S.E.2d at 388–89. Similar situations arise frequently across the country.

A. Charges requiring proof of the accused's convicted-offender status are frequently joined with other charges

Many offenses require proof of a defendant's felon or other convicted-offender status, and many States allow prosecutors to charge all offenses—including status crimes and aggravators—arising from the same incident together. Accordingly, the Court's decision here has the potential to affect a large number of cases.

1. Every State bars at least some felons from possessing firearms, and nearly every State's courts have held that a prior conviction for a disqualifying felony is an essential element of the crime. *See, e.g.*, *Russell v. State*, 997 N.E.2d 351, 354 & n.1 (Ind. 2013) (prohibiting serious violent felons from possessing firearms); *cf.* 18 U.S.C. § 922(g)(1); *Old Chief v. United States*, 519 U.S. 172, 185–86 (1997). An Appendix to this brief lists state statutes prohibiting persons previously convicted of various offenses from

possessing firearms, along with related state cases identifying proof of a prior conviction as an element of the offense.

Many other criminal laws also require the prosecution to prove that the defendant has a particular criminal status. Although most are aggravated versions of lower-level offenses, state courts often hold that proof of the defendant's criminal status is an element of the aggravated offense that must be submitted to a jury and proved beyond a reasonable doubt. *See, e.g.*, *State v. Allen*, 506 N.E.2d 199, 200–01 (Ohio 1987) (holding that where a prior conviction increases the degree of the offense it is an element of the aggravated offense).

For example, proof of a prior DUI conviction is an element of an aggravated DUI offense in many States. *See, e.g.*, *State ex rel. Romley v. Galati*, 985 P.2d 494, 496–97 (Ariz. 1999); *Ex Parte Benson*, 459 S.W.3d 67, 74–75 (Tex. Crim. App. 2015); *State v. Alexander*, 571 N.W.2d 662, 664 (Wis. 1997); *see also State v. Murray*, 169 P.3d 955, 968–69 (Haw. 2007) (discussing cases from other states); *cf. State v. Mburu*, 346 P.3d 1086, 1090 (Kan. Ct. App. 2015) (observing that proof of a prior DUI conviction is an element for the offense of refusing to submit to alcohol or drug testing).

Similarly, a few States require proof of a prior drug-related conviction to convict a defendant of an aggravated drug-trafficking charge. *See, e.g.*, *State v. Fox*, 105 A.3d 1029, 1032 (Me. 2014); *State v. Riley*,

649 N.E.2d 914, 916–17 (Ohio Ct. App. 1994). Use of aggravators to escalate the severity of a criminal charge is driven by anti-recidivism policies aimed at decreasing the recurrence of particularly destructive misconduct. *Cf. Missouri v. McNeely*, 569 U.S. 141, 160 (2013) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." (citation omitted)); *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring in part and concurring in the judgment) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our yo[illegible] cause greater concern than the escalating use [illegible] controlled substances.").

Aggravated offenses against the person also often require proof of a prior similar conviction, on the basis that assailants have a tendency to escalate their violent acts. So, for example, many States require proof of a prior domestic violence conviction as an element of aggravated domestic violence. *See, e.g.*, *State v. Newnom*, 95 P.3d 950, 950–51 (Ariz. Ct. App. 2004); *Murray*, 169 P.3d at 960–61; *Lisle v. Commonwealth*, 290 S.W.3d 675, 678–79 (Ky. Ct. App. 2009); *State v. Bibler*, 17 N.E.3d 1154, 1156 (Ohio Ct. App. 2014); *Reyes v. State*, 314 S.W.3d 74, 81 (Tex. App. 2010); *State v. Ortega*, 142 P.3d 175, 176–77 (Wash. Ct. App. 2006); *cf. State v. Brillon*, 995 A.2d 557, 559–70 (Vt. 2010) (addressing domestic

violence charge joined with contempt charge for violating a protective order). Likewise, a repeat assault upon the same victim may constitute an aggravated offense requiring proof of a prior conviction. *See, e.g.*, *State v. Hambrick*, 75 P.3d 462, 462–63 (Or. Ct. App. 2003).

Sex offenses and invasions of privacy raise similar escalation concerns, so some aggravated sex crimes and stalking offenses require proof of a prior similar conviction. *See, e.g.*, *State ex rel. Thomas v. Talamante*, 149 P.3d 484, 486 (Ariz. Ct. App. 2006) (violent sexual assault); *State v. Roswell*, 196 P.3d 705, 707 (Wash. 2008) (felony communication with a minor for immoral purposes); *State v. Warbelton*, 759 N.W.2d 557, 559, 566–67 (Wis. 2009) (stalking).

Property crimes often require proof of a previous conviction as well. For instance, in several States, a prior conviction for a property crime exposes a defendant to greater criminal liability for a higher degree of property crime. *See, e.g.*, *Tallent v. State*, 951 P.2d 857, 861 (Alaska Ct. App. 1997) (second-degree theft); *State v. Benton*, 526 S.E.2d 228, 229–31 (S.C. 2000) (first-degree burglary). In other States, a prior property conviction can transform a misdemeanor charge into a felony charge. *See, e.g.*, *State v. Lara*, 379 P.3d 224, 225 (Ariz. Ct. App. 2016) (felony shoplifting); *People v. Hicks*, 501 N.E.2d 1027, 1030 (Ill. App. Ct. 1986) (felony theft).

Finally, to prove the offense of escape, the prosecution must often prove that at the time of flight the accused was confined due to a felony conviction. *See, e.g.*, *State v. James*, 81 S.W.3d 751, 761 (Tenn. 2002); *State v. Gonzales*, 693 P.2d 119, 120–21 (Wash. 1985); *cf. Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005) (en banc) (evading arrest).

With so many crimes requiring proof of a prior conviction, States must inevitably—and frequently—address collateral fairness issues attendant to such proof.

2. Even as many offenses require proof of the defendant's criminal status, prevailing norms of criminal procedure encourage joinder of offenses and consolidation of trials. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 537 (1993); *State v. Jones*, 662 A.2d 1199, 1209 (Conn. 1995). "Joint trials 'play a vital role in the criminal justice system.'" *Zafiro*, 506 U.S. at 537 (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)). Joining multiple offenses for a single trial conserves scarce judicial and prosecutorial resources, reduces inconvenience to witnesses and jurors, and minimizes the chance of incongruous results. *See, e.g.*, *State v. Dunkins*, 460 N.E.2d 688, 690 (Ohio Ct. App. 1983).

Although the details of joinder rules vary, all state and federal courts permit joinder of offenses based upon the same conduct or criminal transaction. *See, e.g.*, Ind. Code § 35-34-1-9; 5 Wayne R. LaFave et al.,

Criminal Procedure § 17.1(a), at 2–3 nn.2–6 (4th ed. 2015) (collecting statutes and rules from most States); *accord* Fed. R. Crim. P. 8(a). Joinder is particularly apropos in this context, because separate trials would require the prosecution to put on the same witnesses and evidence with only minor variations from trial to trial. *See, e.g.*, *Carter v. State*, 824 A.2d 123, 133 (Md. 2003); *Dunkins*, 460 N.E.2d at 690; *Mitchell v. State*, 270 P.3d 160, 170–71 (Okla. Crim. App. 2011).

B. Severance and bifurcation ameliorate unfair prejudice that can arise from proof of a defendant's prior convictions

Unsurprisingly, prosecutors and courts generally prefer joint trials, which means that, absent objection from the defense, it is common for charges requiring proof of the defendant's criminal status to be joined for trial with other charges. Yet there is no denying that joint trials in such cases create a risk of unfair prejudice as to non-status-crime charges because a defendant's prior convictions are placed before the jury. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (discussing the rationale underlying the common law's treatment of prior-crimes evidence).

Accordingly, when defendants object to joint trials, courts use three general approaches to reduce or eliminate that risk: (1) severance; (2) bifurcation; or (3) curative measures, such as stipulations and limiting instructions. *See, e.g.*, *State v. Burns*, 344

P.3d 303, 317 (Ariz. 2015) (approving all three as viable options); *People v. Peterson*, 656 P.2d 1301, 1305 (Colo. 1983) (same).

1. Severance means separate trials before different juries, which is what Currier received. Trying the charges that do not require proof of a prior conviction separately reduces the chance that the jury will learn of the defendant's criminal status—and be influenced by it—while determining the defendant's guilt or innocence on those non-status-crime charges.[1] *See, e.g., Hackney*, 504 S.E.2d at 388–89. Trial courts in almost every State have discretion to sever otherwise properly joined charges if joinder appears to prejudice the defendant. *See, e.g.*, Ind. Code § 35-34-1-11; *accord* Fed. R. Crim. P. 14. *But see Walker v. State*, 635 S.E.2d 740, 748 (Ga. 2006) (holding that trial courts cannot sever a felon-in-possession charge from other charges); *People v. Wells*, 35 N.Y.S.3d 795, 800 (N.Y. App. Div. 2016) (explaining that under N.Y. Crim. Proc. Law § 200.20[3] a court's discretion to grant severance is strictly limited). Fifteen States require or have a presumption in favor of severance when a defendant is charged with both status and non-status crimes.

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[1] Severance does not eliminate the potential for the defendant's criminal past to be admitted into evidence; it may still be admissible to prove motive, opportunity, intent, or plan, or to impeach the defendant. *See, e.g.*, Fed. R. Evid. 404(b)(2); Fed. R. Evid. 609.

Like Virginia, courts in Alabama, Florida, Illinois, Missouri, and Pennsylvania generally require (upon timely request of the defendant) severance of a felon-in-possession charge from other charges. *Anderson v. State*, 886 So. 2d 895, 896–98 (Ala. Crim. App. 2003); *State v. Vazquez*, 419 So. 2d 1088, 1090–91 (Fla. 1982); *People v. Edwards*, 345 N.E.2d 496, 498–99 (Ill. 1976); *State v. Cook*, 673 S.W.2d 469, 472–73 (Mo. Ct. App. 1984); *Commonwealth v. Jones*, 858 A.2d 1198, 1206–08 (Pa. Super. Ct. 2004); *Hackney*, 504 S.E.2d at 388–89. And Texas requires, upon timely request by the defense, severance in *any* case where the charges are based on a single episode of criminal conduct. Tex. Penal Code Ann. § 3.04(a); *Graham v. State*, 19 S.W.3d 851, 852 n.2 (Tex. Crim. App. 2000).

Furthermore, Alaska, Arizona, Colorado, Kentucky, Nevada, New Jersey, New Mexico, and Utah require severance upon a defendant's request unless the parties agree to prevent the jury from learning of the defendant's prior crimes while it considers the other charges. *See Elerson v. State*, 732 P.2d 192, 195 (Alaska Ct. App. 1987); *Burns*, 344 P.3d at 316; *Peterson*, 656 P.2d at 1305; *Wallace v. Commonwealth*, 478 S.W.3d 291, 302 (Ky. 2015); *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998); *State v. Ragland*, 519 A.2d 1361, 1363–64 (N.J. 1986); *State v. Garcia*, 246 P.3d 1057, 1065 (N.M. 2011); *State v. Long*, 721 P.2d 483, 495 (Utah 1986).

Arkansas has a presumption in favor of severance, but its Supreme Court declined to adopt a per se rule requiring it. *See Sutton v. State*, 844 S.W.2d 350, 352–54 (Ark. 1993).

In federal court, the Third Circuit requires courts to sever (or bifurcate) a felon-in-possession charge from other charges if evidence of the prior conviction is not independently admissible with respect to the other charges. *See United States v. Joshua*, 976 F.2d 844, 847–48 (3d Cir. 1992), *abrogated on other grounds by Stinson v. United States*, 508 U.S. 36 (1993); *United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980).

Other circuits entrust the decision whether to sever a felon-in-possession charge from other charges to the district court's discretion and reverse it only upon a showing of abuse. *See, e.g., United States v. Ouimette*, 753 F.2d 188, 193 (1st Cir. 1985); *United States v. Page*, 657 F.3d 126, 129–32 (2d Cir. 2011); *United States v. Silva*, 745 F.2d 840, 843–44 (4th Cir. 1984); *United States v. Rice*, 607 F.3d 133, 141–42 (5th Cir. 2010); *United States v. Lee*, 428 F.2d 917, 920–21 (6th Cir. 1970); *United States v. Aleman*, 609 F.2d 298, 310 (7th Cir. 1979), *superseded by statute on other grounds as stated in Jake v. Herschberger*, 173 F.3d 1059, 1065 n.6 (7th Cir. 1999); *United States v. Rock*, 282 F.3d 548, 552 (8th Cir. 2002); *United States v. Burgess*, 791 F.2d 676, 678–79 (9th Cir. 1986);

United States v. Valentine, 706 F.2d 282, 289–90 (10th Cir. 1983); *United States v. Jiminez*, 983 F.2d 1020, 1022–23 (11th Cir. 1993); *United States v. Daniels*, 770 F.2d 1111, 1115–18 (D.C. Cir. 1985).

2. In lieu of severance, some courts conduct bifurcated proceedings, in which prosecutors try multiple charges to the same jury but in separate phases. That way, the jury does not learn of the defendant's felon status until after it has adjudicated the offenses for which that fact is irrelevant. *See, e.g.*, *Hines v. State*, 794 N.E.2d 469, 472–73 (Ind. Ct. App. 2003), *adopted and incorporated*, 801 N.E.2d 634 (Ind. 2004). In the first phase of a bifurcated proceeding, the jury hears evidence and renders a verdict on the charges for which the accused's criminal status is irrelevant, and in the second phase the same jury (or the judge) hears evidence and renders a verdict on the offense for which criminal status is an essential element. *E.g.*, *Head v. State*, 322 S.E.2d 228, 232 (Ga. 1984) (outlining the manner in which a bifurcated trial should proceed), *overruled in part on other grounds by Ross v. State*, 614 S.E.2d 31, 34 n.17 (Ga. 2005).

Thirteen States require or allow this type of bifurcated proceeding. Alaska, Arizona, Colorado, Kentucky, Nevada, New Jersey, New Mexico, and Utah have endorsed bifurcation as an alternative to mandatory severance. *See Elerson*, 732 P.2d at 195; *Burns*, 344 P.3d at 317; *Peterson*, 656 P.2d at 1305;

Wallace, 478 S.W.3d at 305; *Morales v. State*, 143 P.3d 463, 465–66 (Nev. 2006); *Ragland*, 519 A.2d at 1363–64; *Garcia*, 246 P.3d at 1065; *State v. Reece*, 349 P.3d 712, 735–36 (Utah 2015).

Georgia, Indiana, and Oklahoma require bifurcation when a felon-in-possession charge is joined with other charges. *Head*, 322 S.E.2d at 232; *Pickett v. State*, 83 N.E.3d 717, 719–20 (Ind. Ct. App. 2017); *Chapple v. State*, 866 P.2d 1213, 1217 (Okla. Crim. App. 1993).

Tennessee has deemed bifurcation the "better procedure" for trying multiple offenses when only some charges require proof of criminal status. *State v. Foust*, 482 S.W.3d 20, 46–47 (Tenn. Crim. App. 2015). Similarly, the District of Columbia allows bifurcation in lieu of severance but requires neither. *See Goodall v. United States*, 686 A.2d 178, 184 (D.C. 1996).

Federally, the Third Circuit has approved bifurcation as a permissible alternative to severance. *Joshua*, 976 F.2d at 847–48. The Second and Ninth Circuits, while not requiring severance or bifurcation in every case, have held that either is permissible. *See United States v. Nguyen*, 88 F.3d 812, 815–18 (9th Cir.

1996); *United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994).[2]

C. Applying issue preclusion to cases like Currier's will deter the use of severance or bifurcation

As the above-cited cases imply, a decision for Currier would have a ripple effect throughout the state and federal courts that require or encourage severance or bifurcation.

1. State courts that require severance often do so on the basis that the efficiency policies underlying joinder are outweighed by the risk of unfair prejudice

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[2] A few jurisdictions even permit bifurcation of the elements of the offense, such that the jury determines the existence of the non-conviction elements of the offense before evidence of the accused's prior conviction is presented. *See Littlepage v. State*, 863 S.W.2d 276, 280–81 (Ark. 1993); *Reece*, 349 P.3d at 735–36. Most States and federal circuit courts that have considered the issue have rejected element-by-element bifurcation, however. *See People v. Fullerton*, 525 P.2d 1166, 1167–68 (Colo. 1974); *State v. Morales*, 160 A.3d 383, 390 (Conn. App. Ct. 2017); *Goodall*, 686 A.2d at 183–84; *State v. Olivera*, 555 P.2d 1199, 1203–04 (Haw. 1976); *People v. Davis*, 940 N.E.2d 712, 722–23 (Ill. App. Ct. 2010); *State v. Owens*, 635 N.W.2d 478, 483–84 (Iowa 2001); *Carter*, 824 A.2d at 133–36; *Rigby v. State*, 826 So. 2d 694, 700 (Miss. 2002); *State v. Young*, 986 A.2d 497, 500–01 (N.H. 2009); *State v. Brown*, 853 A.2d 260, 263 (N.J. 2004); *Williams v. State*, 794 P.2d 759, 762–63 (Okla. Crim. App. 1990); *Brillon*, 995 A.2d at 569 (dicta); *State v. Herbert*, 767 S.E.2d 471, 489–90 (W. Va. 2014); *accord United States v. Jacobs*, 44 F.3d 1219, 1221–23 (3d Cir. 1995) (Alito, J.) (collecting cases).

to the accused from the revelation of his criminal status. *See, e.g., Anderson*, 886 So. 2d at 897; *Edwards*, 345 N.E.2d at 499. But a decision in Currier's favor would significantly alter that balance of interests. Joinder would not only be more efficient for the prosecution but also safer, as it would avoid the risk of not having a fair opportunity to try the accused on all charges arising from a single incident. A state court's balancing might come out differently when that variable is added to the calculus.

Even if a decision for Currier does not sway the courts in those States that already require severance, it would provide disincentive for other States to adopt severance rules. And prosecutors would have every reason to resist severance motions. Indeed, state legislatures or even the people may deem it necessary or advisable to enact statutes or constitutional amendments *prohibiting* severance. *Cf.* Cal. Const. art. 1, § 28(f)(4) ("When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."); *People v. Valentine*, 720 P.2d 913, 914 (Cal. 1986) (explaining that the constitutional amendment in subsection 28(f)(4) was in direct response to a state supreme court decision prohibiting the jury from learning of the prior conviction if the defendant stipulated to it).

The net result could be more cases where the jury learns of criminal history even when deciding charges for which that history is irrelevant. Hence, though a

ruling in Currier's favor could appear to be pro-defendant, its results could be decidedly the opposite.

2. Bifurcation is an alternative to severance that allows the prosecution a fair opportunity to try all charges arising from the same incident while at the same time shielding the jury from evidence of the accused's previous convictions while it contemplates the charges for which the evidence is irrelevant. But if Currier prevails here and double-jeopardy issue preclusion applies when charges are severed, the question arises whether it also applies when they are bifurcated. It should not, and in the event the Court rules for Currier in this case, it should make clear that its decision does not apply to bifurcation scenarios.

It would be unreasonable for an acquittal in the first phase to have preclusive effect on the second phase tried to the same jury: despite the first verdict, the court does not enter final judgment until the end of trial. *See, e.g., Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (explaining that "collateral estoppel" or issue preclusion "means simply that when an issue of ultimate fact has once been determined *by a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit" (emphasis added)).

At least two courts have acknowledged that the critical fact in *Ashe* was the existence of a final judgment, not merely a verdict. *See State v. Knight*,

835 A.2d 47, 51–53 (Conn. 2003) (holding that issue preclusion did not apply in a bifurcated proceeding where the jury decided some charges while the judge decided others simultaneously); *Copening v. United States*, 353 A.2d 305, 310–11 (D.C. 1976) (same), *superseded by statute on other grounds as stated in Davis v. United States*, 984 A.2d 1255, 1260 (D.C. 2009); *see also Head*, 322 S.E.2d at 232 (explaining that the second phase of a bifurcated proceeding should proceed whether the verdict in the first phase is guilt or acquittal). That said, one state court has suggested that an acquittal in the first phase of a bifurcated proceeding has preclusive effect with respect to the second phase of the same proceeding. *See Galloway v. State*, 809 A.2d 653, 675 (Md. 2002).

If a decision for Currier in this case *did* cast doubt on the permissibility of proceeding to the second phase of a bifurcated trial after an acquittal in the first phase, prosecutors would insist on a unitary proceeding in all cases. More juries, not fewer, would then be exposed to defendants' criminal status. At the very least, the Court should make clear that a decision in Currier's favor leaves room for a bifurcated trial to proceed before the same jury despite a phase-one acquittal.

II. Currier Was Not Given a "Hobson's Choice" Between Two Constitutional Rights

Relying on *Simmons v. United States*, 390 U.S. 377 (1968), the NACDL argues that Currier was improperly required to choose between two constitutional rights, namely, his double-jeopardy right to the issue-preclusive effect of an acquittal and his right not to have his prior convictions placed before the jury. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae*; *see also* Brief for Petitioner 28–32. The problem with this argument, however, is that the Court has already said the second "right" does not actually exist.

A. The Due Process Clause does not under any circumstances preclude evidence of an accused's prior convictions

The Court has on several occasions considered whether prosecutors may place a defendant's prior convictions before a jury and has repeatedly held that constitutional due process principles are no barrier to such evidence.

1. In *Spencer v. Texas*, 385 U.S. 554 (1967), the Court expressly rejected the argument that the Constitution precludes evidence of a defendant's prior convictions. 385 U.S. at 562–69. First, the Court observed, the law of evidence (developed chiefly by the States) had "evolved a set of rules designed to reconcile the possibility that this type of information

will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes." *Id.* at 562. The Court acknowledged the practical reality that "[t]o say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Id.* Any risk of prejudicial effect is "justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." *Id.* Indeed, the Court's precedents "nowhere . . . approach the issue in constitutional terms." *Id.* at 563.

Next, the Court in *Spencer* said that, while the Court has "long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," it has never thought that the Constitution ordains it with authority to become "a rule-making organ for the promulgation of state rules of criminal procedure." *Id.* at 563–64. Given "the legitimate state purpose and the long-standing and widespread use" of evidence of prior crimes coupled with limiting instructions, the Court declared "it impossible to say

that because of the possibility of some collateral prejudice the Texas procedure [was] rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases." *Id.* at 564. It observed that its precedents did not "even remotely support[] the proposition that the States are not free to enact habitual-offender statutes . . . and to admit evidence during trial tending to prove allegations required under the statutory scheme." *Id.* at 565–66.

The Court acknowledged that the States had developed "a wide variety of methods of dealing with the problem" of admitting proof of prior convictions in the context of recidivism statutes. *Id.* at 566. Yet determining the "best" trial procedure would require balancing many competing considerations, and to say that a bifurcated trial "is probably the fairest . . . is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment." *Id.* at 567–68. Quoting Justice Cardozo, the *Spencer* Court observed that "a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.'" *Id.* at 564 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The *Spencer* Court also observed that accepting the petitioners' view would require "substantial

changes in trial procedure in countless local courts around the country." *Id.* at 568. It was unwilling to take that step and thereby transgress fundamental principles of federalism and judicial restraint. *Id.* at 568–69.

2. The Court reaffirmed *Spencer* in *Marshall v. Lonberger*, 459 U.S. 422 (1983), where it approved use of a prior Illinois guilty plea as an aggravator to a murder charge in Ohio, holding "that the admission in the Ohio murder trial of the conviction based on that plea deprived respondent of no federal right." *Id.* at 438 (citing *Spencer*, 385 U.S. 554). "The common law," the Court observed, "was far more ambivalent" with respect to the admissibility of prior-crimes evidence, as demonstrated by the many exceptions to the general rule. *Id.* at 438 n.6. "In short, the common law, like . . . *Spencer*, implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification." *Id.* *Lonberger* confirmed the constitutionality of introducing prior-crimes evidence coupled with limiting instructions. *Id.*

Accordingly, nothing in this Court's decisions supports the idea that Currier's due process rights would have been violated by a single trial in which evidence of his prior convictions would have been admitted to prove the felon-status element of the

firearm charge. In fact, the only time the Court has disapproved admission of prior-crimes evidence to prove an element of the offense, it did so as a matter of evidentiary law, *not* constitutional right. *See Old Chief v. United States*, 519 U.S. 172, 190–92 (1997); *cf. Michelson v. United States*, 335 U.S. 469 (1948) (affirming the admission of prior-crimes evidence for the purpose of cross-examining the defendant's character witnesses).

B. State and federal courts commonly permit evidence of past criminal convictions even where not relevant to all charges

Many States permit the prosecution to introduce evidence of prior convictions where such evidence is relevant to some, but not all, of the charges. In such cases, of course, state courts implement measures to ameliorate the risk of unfair prejudice. At least half the States permit a unitary trial if the prior conviction is stipulated, disclosed to the jury but not described, or limited through a jury instruction, including several of the States that strongly encourage severance or bifurcation. *See Mead v. State*, 445 P.2d 229, 234 (Alaska 1968); *State v. Burns*, 344 P.3d 303, 317 (Ariz. 2015); *People v. Cunningham*, 25 P.3d 519, 557–58 (Cal. 2001); *People v. Peterson*, 656 P.2d 1301, 1305 (Colo. 1983); *State v. Morales*, 160 A.3d 383, 390–93 (Conn. App. Ct. 2017); *Massey v. State*, 953 A.2d 210, 217–19 (Del. 2008); *Williams v. United States*, 75 A.3d 217, 221–22 (D.C. 2013); *State v.*

Hilongo, 645 P.2d 314, 315 (Haw. 1982); *State v. Wilske*, 350 P.3d 344, 346–48 (Idaho Ct. App. 2015); *Hines v. State*, 794 N.E.2d 469, 474 (Ind. Ct. App. 2003), *adopted and incorporated*, 801 N.E.2d 634 (Ind. 2004); *State v. Owens*, 635 N.W.2d 478, 482–84 (Iowa 2001); *State v. Gander*, 551 P.2d 797, 799–800 (Kan. 1976); *State v. Graps*, 42 So. 3d 1066, 1070–71 (La. Ct. App. 2010); *State v. Fournier*, 554 A.2d 1184, 1186–87 (Me. 1989); *Carter v. State*, 824 A.2d 123, 131–33 (Md. 2003); *People v. Mayfield*, 562 N.W.2d 272, 274–75 (Mich. Ct. App. 1997); *Richardson v. State*, 74 So. 3d 317, 324 (Miss. 2011); *State v. Mowell*, 672 N.W.2d 389, 404 (Neb. 2003); *State v. Wood*, 647 S.E.2d 679, 683–84 (N.C. Ct. App. 2007); *State v. Dunkins*, 460 N.E.2d 688, 690–91 (Ohio Ct. App. 1983); *Warren v. Baldwin*, 915 P.2d 1016, 1021–22 (Or. Ct. App. 1996); *State v. Anderson*, 458 S.E.2d 56, 57–58 (S.C. Ct. App. 1995); *State v. Vu*, 405 P.3d 879, 883 & n.5 (Utah Ct. App. 2017); *State v. Thompson*, 781 P.2d 501, 504 (Wash. Ct. App. 1989); *State v. Prescott*, 825 N.W.2d 515, 518–21 (Wis. Ct. App. 2012).

The majority of the federal circuits also do not require severance or bifurcation and instead rely on curative measures in a unitary proceeding. *See, e.g.*, *United States v. Hackley*, 662 F.3d 671, 684 (4th Cir. 2011); *United States v. Rice*, 607 F.3d 133, 141–42 (5th Cir. 2010); *United States v. Stokes*, 211 F.3d 1039, 1042–43 (7th Cir. 2000); *United States v. Kind*, 194 F.3d 900, 906 (8th Cir. 1999); *United States v.*

Nguyen, 88 F.3d 812, 815–18 (9th Cir. 1996); *United States v. Jones*, 213 F.3d 1253, 1260–61 (10th Cir. 2000); *United States v. Jiminez*, 983 F.2d 1020, 1022 (11th Cir. 1993); *United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997).

To be sure, the Second, Ninth, and D.C. Circuits have expressed concern over joining felon-in-possession charges with other charges for a unitary trial, and each has expressed doubt as to the utility of limiting instructions. *See United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994); *United States v. Lewis*, 787 F.2d 1318, 1322–23 (9th Cir. 1986); *United States v. Daniels*, 770 F.2d 1111, 1115–18 (D.C. Cir. 1985). But even those courts have held that severance is not required in every case. *Compare Jones*, 16 F.3d at 493 (severance required), *Lewis*, 787 F.2d at 1322–23 (same), *and United States v. Dockery*, 955 F.2d 50, 54–56 (D.C. Cir. 1992) (same), *with United States v. Page*, 657 F.3d 126, 129–32 (2d Cir. 2011) (severance not required), *United States v. Burgess*, 791 F.2d 676, 678–79 (9th Cir. 1986) (same), *and Daniels*, 770 F.2d at 1115–18 (same).

Accepting NACDL's argument would cast serious doubt on the constitutionality of the trial procedures followed in the majority of American courts. Just as in *Spencer*, taking "such a step would be quite beyond the pale of this Court's proper function in our federal system" and "be a wholly unjustifiable encroachment by this Court upon the constitutional power of States

to promulgate their own rules of evidence to try their own state-created crimes in their own state courts." 385 U.S. at 568.

Constitutionalizing rules of evidence would also put prosecutors in an untenable position: They could not sever (or perhaps even bifurcate) trials without risking issue preclusion if they lose the first phase, but they also could not introduce the necessary evidence of the predicate prior conviction into a joint trial. Accordingly, the Court should stand by its precedents holding that evidence of former crimes is a matter of evidentiary law, not due process.

C. Prosecutors and courts may hold criminal defendants to the procedural consequences of their strategic choices

Because Currier was not forced to choose between two constitutional rights, it follows that there is no justification—constitutional or equitable—for allowing him to claim double jeopardy protection from a situation to which he agreed and from which he benefitted. His situation is not comparable to *Simmons*, where the defendant had to choose between his Fourth Amendment right against unreasonable searches and seizures and his Fifth Amendment privilege against self-incrimination. 390 U.S. at 389–94. Although the Constitution may ordinarily forbid States from forcing the accused to forgo one constitutional right to exercise another, it does not

forbid the defendant from being forced to make difficult strategic choices, such as, for example, whether to testify or plead guilty. Defendants are often required to make "difficult judgments as to which course to follow," and even when the choice involves a constitutional right, "the Constitution does not by that token always forbid requiring [them] to choose." *McGautha v. California*, 402 U.S. 183, 213 (1971), *reh'g granted, judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972). Instead, courts ask "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.*

Again, Currier was not forced to choose between constitutional rights. The right he claims to have been infringed—his protection against double jeopardy—is intended to safeguard individuals from government overreach and oppression. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 498–99 (1984). But everything Currier complains about arose because *he* desired severance of the charges. A State that assents to the procedure requested by the defendant can hardly be said to be overreaching or to be oppressing the defendant. The Constitution grants criminal defendants the right to choose a strategy, but it does not grant them the right to be free from the consequences of that choice.

CONCLUSION

For these reasons, the judgment of the Virginia Supreme Court should be affirmed.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici *States*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
AARON T. CRAFT
LARA LANGENECKERT
JULIA C. PAYNE
Deputy Attorneys General

**Counsel of Record*

Dated: January 9, 2018

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

JANET T. MILLS
Attorney General
State of Maine

BILL SCHUETTE
Attorney General
State of Michigan

TIMOTHY C. FOX
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

JOSHUA H. STEIN
Attorney General
State of North Carolina

WAYNE STENEHJEM
Attorney General
State of North Dakota

MIKE HUNTER
Attorney General
State of Oklahoma

JOSH SHAPIRO
Attorney General
Commonwealth of
Pennsylvania

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

KEN PAXTON
Attorney General
State of Texas

PETER K. MICHAEL
Attorney General
State of Wyoming

SEAN D. REYES
Attorney General
State of Utah

Counsel for Amici *States*

Dated: January 9, 2018